

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0395-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
SANTIAGO ALBERTO)	Rule 111, Rules of
ALTAMIRANO, SR.,)	the Supreme Court
)	
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20040875, CR-20042130, and CR-20044278 (Consolidated)

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Santiago A. Altamirano

Hinton, OK
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 According to our memorandum decision in a previous, of-right post-conviction proceeding filed by petitioner Santiago Altamirano, Sr., Altamirano pled guilty in each of three separate Pima County cases—cause numbers CR-20040875, CR-20042130, CR-20044278—to aggravated driving under the influence of an intoxicant (DUI) with a suspended driver’s license, twice with two previous DUI convictions. He was sentenced in April 2005 to a combination of concurrent and consecutive, presumptive prison terms, two of them enhanced, totaling twenty years’ incarceration.

¶2 In September 2005, Altamirano filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., seeking to be resentenced to concurrent terms. He asserted in his petition that, had the trial court been presented with additional mitigating evidence originally, it would not have sentenced him to consecutive, ten-year terms. Altamirano argued that the additional evidence he wished to present was either newly discovered or that trial counsel had been ineffective in failing to present it. The trial court found no merit to his claims, denied relief, and ratified its decision to impose consecutive sentences. We upheld the trial court’s ruling on review. *State v. Altamirano*, No. 2 CA-CR 2006-0161-PR (memorandum decision filed Jan. 31, 2007).

¶3 In November 2008, Altamirano initiated the current proceeding with the filing of a successive notice of post-conviction relief pursuant to Rule 32. Describing the claim he intended to raise, Altamirano asserted in his notice that the trial court had committed fundamental error at sentencing by enhancing two of his three sentences on the basis of two

prior convictions, one of which did not properly qualify as an historical prior felony conviction. Although the two authorities he cited in support of his contention, *State v. Thompson*, 200 Ariz. 439, 27 P.3d 796 (2001), and *State v. Ofstedahl*, 208 Ariz. 406, 93 P.3d 1122 (App. 2004), had both been decided before his sentencing in April 2005, Altamirano contended he had “recently found out for the very first time” about those decisions. He therefore asserted his claim fell under Rule 32.1(e) and was exempt from preclusion under Rule 32.2(a) by virtue of Rule 32.2(b).

¶4 The trial court found Altamirano’s claim fell within Rule 32.1(c),¹ not Rule 32.1(e), and was therefore precluded. *See* Ariz. R. Crim. P. 32.2(b) (claims exempt from preclusion include only those under subsections (d), (e), (f), (g), and (h) of Rule 32.1); *cf.* *State v. Swoopes*, 216 Ariz. 390, ¶42, 166 P.3d 945, 958 (App. 2007) (claims of fundamental error subject to preclusion under Rule 32.2(a)). The court’s minute entry ruling states:

A defendant shall be precluded from relief under Rule 32 based upon any ground that has been waived in a previous collateral proceeding. Rule 32.2(a), Ariz. R. Crim. P. The preclusion rule does not apply for certain exceptions, including the discovery of material facts after trial. To invoke an exception to preclusion, the Petitioner must state meritorious reasons to substantiate it. Here, Petitioner has cited as newly discovered material facts two Arizona Supreme Court cases, [sic] decided in 2001 and 2004 prior to his sentencing and his first Post-Conviction relief proceeding. The fact that Petitioner himself has just become aware of the cases does not qualify as

¹Among the grounds for post-conviction relief under Rule 32.1(c) is the claim that “[t]he sentence imposed exceeded the [maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law.]”

a meritorious reason to establish an exception for newly discovered facts.

The substance of Petitioner's claim is that the Court erred in sentencing him to an enhanced sentence. While this is grounds for relief in a timely filed Rule 32 of-right, it is not a basis for an exception to the preclusion rules. Ariz. R. Crim. P. 32.1(c) and 32.2(b).

Because Petitioner has failed to state meritorious reasons to substantiate a specific exception to the preclusion rules, IT IS ORDERED summarily dismissing the Notice of Post-Conviction Relief filed on November 10, 2008.

¶5 This court will not disturb a trial court's denial of post-conviction relief absent a clear abuse of the trial court's discretion, which includes legal error. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948; *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007). The court did not abuse its discretion here in dismissing Altamirano's notice summarily. *See Ariz. R. Crim. P. 32.2(b)*.

¶6 We grant the petition for review, but we deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge